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91-721

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES DAVIS,

PETITIONER,

VS.

DONALD RICE, SECRETARY OF
THE AIR FORCE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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COUNSEL OF RECORD

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QUESTIONS PRESENTED

1. Whether eight year old allegations of sexual harassment, coupled with more recent allegations of sexual harassment which in themselves are insufficient as a matter of law under Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986) to support a

claim of sexual harassment, may be used by the Air Force as a basis for demotion?

2. Whether in a "mixed case" claim under 5 U.S.C. § 7703 the reviewing court must declare a Merit System Protection Board (hereinafter "MSPB") decision which affirmed a demotion based on sexual harassment as "arbitrary and capricious" when the factual basis for the sexual harassment charge is legally insufficient to support a sexual harassment claim?

3. Whether Davis presented sufficient issue of material fact to withstand summary judgment when he demonstrated that the charges of sexual harassment which the Air Force relied upon to effect his demotion were legally insufficient under Meritor and further alleged that the sexual harassment charges were fabricated by the Air Force in retaliation for his inter-racial

relationship with a Caucasian female?

4. Whether in a "mixed case" claim under 5 U.S.C. § 7703, the trial court denies a plaintiff a trial de novo on his claims of race discrimination by failing to review the decision of the MSPB, which determined that a plaintiff engaged in sexual harassment, under a Meritor analysis, when the plaintiff asserts that the claims of sexual harassment were contrived, that the basis for those false allegations were racial animus and that the staleness of those allegations denied him due process of law?

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma granted summary judgment on September 24, 1990. Appeal was taken in the United States Court of Appeals for the Tenth Circuit and on May 15, 1991 the Appeals Court affirmed the decision of the District Court. Both opinions are contained herein as Appendix "A" and "B", respectively.

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is May 15, 1991. The court for which relief is sought is the United States Court of Appeals for the Tenth Circuit. Davis filed a petition for rehearing which was denied by the Court of Appeals on August 1, 1991. This Court has jurisdiction pursuant to 28 United States Code §1254.

The constitutional provision which this case involves is Amendment V which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service of time of War or public danger; nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provision upon which this case relies is 5 U.S.C. §7703 and is set out in the Appendix to this petition.

The Federal Regulation upon which this case relies is 29 C.F.R. § 1613.214(a)(i) and is set out in the Appendix to this petition.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was a violation of 42 U.S.C. § 2000e et seq, and 5 U.S.C. § 7703.

Petitioner, James Davis, Appellant below, Plaintiff at trial, (hereinafter referred to as "Davis" or "Petitioner") was employed by Defendant-Appellee-Respondent, Donald B. Rice, Secretary of the Air Force ("Rice" or "Respondent") as a Supervisory Operating Accountant. On August 7, 1989 Rice proposed to remove Davis from Air Force employment based on allegations of sexual harassment of subordinate female employees. The Notice of Removal was based on allegations of misconduct of four (4) female employees; Doris Mills, Cheryl Dinwiddie, Londa Miranda and Rhonda

Brown. The allegations ranged from 8½ years to 9 months prior to the time that Rice proposed to remove Davis. Mills' allegations were the most senior; and, Miranda's allegations were the most recent. However, none of the allegations made reference to specific time frames, dates, or places of the alleged harassment.

Davis replied to the allegations and stated that he had complimented 2 of the 4 females; however, those compliments were not sexually oriented; and, Davis made the comments in the presence of others. Davis supplied affidavits of sixteen (16) persons, both male and female, who attested to the fact that Davis had not sexually harassed female employees. Moreover, the investigation conducted by Rice resulted in the sworn

statements from six (6) persons who stated that Davis had not engaged in sexual harassment.

After Davis refuted the initial charges, Rice presented Davis with an additional affidavit from Londa Miranda, which had been "inadvertently omitted" from the investigatory file which was much more graphic than her previous statement. In response, Davis submitted the statement of Patricia Higgins, a friend of Miranda, which directly attacked the credibility of Miranda and pointed to Miranda herself as the aggressor. Higgins stated that Miranda had pursued Davis; that Miranda attempted to call Davis from a night club; and that Miranda and Higgins frequently visited Davis' office during work hours.

After reviewing Davis' additional

submissions, Rice then reduced Davis in rank and grade; and, Davis appealed to the MSPB which subsequently affirmed Rice's decision to downgrade. Thereafter, on May 14, 1990, Davis filed suit in federal court alleging that Rice's decision was based on race discrimination and that reliance upon the stale claims of sexual harassment denied him due process of the law.

On July 16, 1990 Rice moved for summary judgment and included the investigatory file of the agency and the decision of the Merit Systems Protection Board as exhibits in support of their motion for summary judgment. Thereafter, Davis submitted an affidavit which further denied the allegations and further contended that he had been wrongfully charged with sexual harassment

under a calculated plan or scheme by Rice based on his race and based upon his inter-racial relationship with a female supervisor. The trial court granted summary judgment and the appeals court affirmed the court's decision.

ARGUMENT

Davis seeks review of by this Court on writ of certiorari on the basis that the United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Pursuant to 5 U.S.C. § 7703 when a plaintiff raises allegations of both discrimination in violation of 42 U.S.C. § 2000e-et seq and procedural errors in an adverse action taken against him in violation of 5 U.S.C. Chapter 75, the case is commonly referred to as a "mixed

case. In that instance, the claims of discrimination are subject to a trial de novo, and the procedural errors are subject to a review of the MSPB record. 5 U.S.C. § 7703.

This case presents a situation where there is no clear cut distinction between the Agency's procedural errors and Davis' allegations of discrimination. Rice contends that Davis was demoted based on sexual harassment; and, in contrast, Davis maintains that the allegations of sexual harassment were contrived; and moreover, those allegations were legally insufficient under Meritor and 29 C.F.R. § 1613.214(a)(i) (which establishes a limitations period of 30 days for claims of sexual harassment) to support a demotion. Davis contends that to the extent that his procedural and

discrimination claims overlapped, he was denied a trial de novo when the reviewing court declined to examine those areas of overlap.

5 U.S.C. § 7703 provides, inter alia, that the court shall review the record of the MSPB and set aside an agency action only in the event that action is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 7703(c)(1). Section 7703 further provides that "except in the case of discrimination... the employee or applicant shall have the right to have the facts subject to a trial de novo by the reviewing court."

Davis contends that the application of § 7703(c)(1), denies him of his right to a trial de novo. More specifically,

Davis submits that under the "arbitrary and capricious" standard § 7703(c)(1), once the Agency's legitimate business reason for Davis' demotion (sexual harassment) was passed upon by the MSPB, that finding must be affirmed by the district court unless "arbitrary, capricious... or otherwise without support in law." In contrast, §7703, provides for a trial de novo in cases which involve discrimination; and, in this case, Davis maintains that the sexual harassment charges, which were passed upon by the MSPB, were a pretext for discrimination and the Agency's disapproval of his inter-racial relationship.

Davis respectfully submits that the application of the two provisions, when as in this case, pivotal issues overlap,

is legally inapposite. Specifically, by application of § 7703(c)(1), Davis is denied a trial de novo on his discrimination claim because the "arbitrary and capricious" language of § 7703(c)(1) prohibits the trial court from examining whether the MSPB finding of sexual harassment was pretext for race discrimination. Thus, under § 7703(c)(1) absent a showing of arbitrariness or capriciousness, the trial court must affirm the MSPB's position; and the ultimate effect of such an application is to chisel the Agency's legitimate business reason in stone, beyond the reach of the reviewing court and beyond the ability of the plaintiff to further attack the conduct as discriminatory or pretext.

In particular, Davis contends that

the lower courts erred on two points of law: first, by examining the administrative record the trial court denied Davis of a trial de novo[1]; and, second, in affirming the decision by the MSPB which concluded that Davis had engaged in sexual harassment, the court failed to apply any of the standards which the courts developed in Meritor Savings Bank v. Vinson, 477 U.S. 57, 106

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[1] See Williams v. Department of the Army, 715 F.2d 1405, 1490 (Fed. Cir. 1983) where the court quotes legislative history regarding bifurcated review which states:

> "In such cases, questions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question and must be considered together."

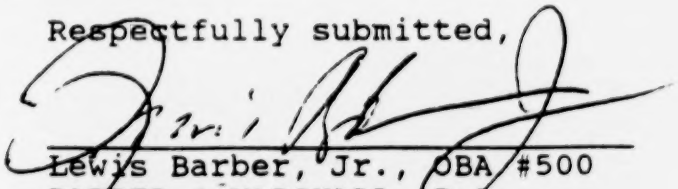
In this case, the question of demotion for misconduct and the response that discrimination was involved are but two sides of the same question. Therefore, Davis submits that bifurcating the review denied his right to a trial de novo. Chandler v. Roundebush, 425 U.S. 840, 96 S.Ct. 1949 (1976).

S.Ct. 2399 (1986); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982); Jackson v. City of Albuquerque, 890 F.2d 225 (10th Cir. 1989) and their progeny, which establish the guidelines for analyzing a sexual harassment claim. Davis submits that the findings of the MSPB were legally insufficient under Meritor; and, the reviewing court should have, as a matter of law set aside the action for legal insufficiency under the authority of § 7703(c)(1). Finally, Davis submits that at a very minimum, the court should have found that Davis had established sufficient issues of fact, with respect to his claim that the sexual harassment charges had been fabricated and were racially motivated, to withstand summary judgment.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore premises considered, Appellant respectfully prays that this Honorable Court grant his Petition for Writ Certiorari.

Respectfully submitted,



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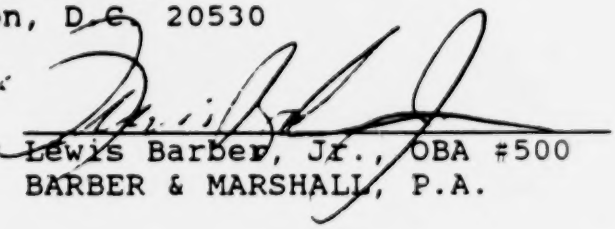
CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 1991, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the following:

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PETITION FOR WRIT OF CERTIORARI TO
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FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

This Petition For Writ of Certiorari was mailed, first class postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States,

on the 30th day of October, 1991, from the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73102.

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STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 30th day of October, 1991.

Notary Public

My Commission Expires:

October 15, 1994

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES DAVIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 90-6358
v.	)	(D.C. No.
	)	CIV-90-776-P)
DONALD B. RICE,	)	
Secretary, Department of	)	
the Air Force,	)	(W.D. Okla.)
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT*[1]

Before ANDERSON, TACHA and BRORBY, Circuit Judges.

This appeal is from an order of the

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

district court granting summary judgment to the defendant on plaintiff's claims of racial discrimination and denial of his constitutional right to equal protection and due process of law.[2] We affirm the grant of summary judgment with respect to the racial discrimination claim. We also agree with the district court that it had no subject matter jurisdiction over plaintiff's constitutional claims and that those claims should be dismissed. [3]

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[2] The parties requested that this matter be submitted on the briefs. After examining the briefs and appellate record, it was determined by the court that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case was therefore ordered submitted without oral argument.

[3] Because the district court had no jurisdiction over plaintiff's constitutional claims, as discussed herein, those claims should have been dismissed. To the extent that the district court's order purports to grant summary judgment to defendant on those

Plaintiff James Davis, a black American, was employed by defendant Secretary of the Air Force as a Supervisory Operating Accountant at Tinker Air Force Base. An investigation by the Inspector General determined that Mr. Davis had engaged in sexual harassment. This conclusion was based on statements by four female employees detailing specific acts of sexual harassment committed against them by Mr. Davis ranging over a period of approximately eight years. Two of the women complained that the objectionable conduct had occurred as recently as April 1989, the month in which the investigation by the Inspector General

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claims, that portion of the order is vacated and Mr. Davis' claims based on due process and equal protection are dismissed.

commenced.

Mr. Davis was initially informed by defendant that he would be removed from his job. In response to this notice, he submitted affidavits from various employees, both male and female, stating that he had not, in their presence, engaged in acts of sexual harassment. After considering Mr. Davis' presentation, the Chief of Accounting and Finance informed Mr. Davis that he would be retained in federal service but demoted from his GS-12 classification to the grade of GS-11 and assigned nonsupervisory duties.

Contemporaneous with the adverse action taken against plaintiff, defendant also imposed disciplinary action against Mr. Donald Fairbetter, a Caucasian, for sexually harassing two female

subordinates. Mr. Fairbetter, like Mr. Davis, was a GS-12 Supervisory Operating Accountant, and he was similarly demoted to a GS-11 grade and deprived of supervisory duties.

Alleging that he had been discriminated against because of his race, plaintiff unsuccessfully appealed his demotion to the Merit Systems Protection Board (hereafter MSPB or the Board). The Administrative Judge found that (1) plaintiff had failed to establish a prima facie case of discrimination; (2) the agency had proven plaintiff's sexual harassment of three female employees; (3) there had been no harmful error to plaintiff in the processing of the proposed removal and resulting demotion action; and (4) the demotion action was "within the limits of

reasonableness and promotes the efficiency of the service." Initial Decision, Merit Systems Protection Board, Dallas Regional Office, No. DA07529010070 (March 8, 1990). Mr. Davis did not pursue his administrative appeal further, and, thus, the Administrative Judge's decision became the MSPB final decision.

In response to his unsuccessful MSPB action, Mr. Davis filed a complaint in the district court for the Western District of Oklahoma under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-2000(h) (1988), alleging racial discrimination and due process and equal protection violations. Mr. Davis contends that (1) he proved a prima facie case of racial discrimination; (2) the findings of sexual harassment were erroneous for a variety of reasons; and

(3) the district court denied him his right to a trial de novo by relying on the record from the administrative proceedings in his racial discrimination case and by granting summary judgment for the defendant.

Final decisions of the MSPB are subject to review by the federal district court and by this court. Wilder v. Prokop, 846 F.2d 613, 620 (10th Cir. 1988). Where the MSPB is acting within the scope of its authority, a fact not disputed here, its findings will be sustained unless they are plainly erroneous or inconsistent with the Board's own regulations. Id. at 619. A reviewing court cannot substitute its judgment for that of the Board and may only act to insure that federal law and required procedures have been followed

and that the action of the Board is not arbitrary or capricious or an abuse of discretion. Id. Under this standard, the Board's action needs only a rational basis in law to be sustained. Id. Because the reviewing district court granted summary judgment in this case, our role is to view the case in the same manner as did that court. Clark v. Atchison, Topeka & Santa Fe Ry. Co., 731 F.2d 698, 799 (10th Cir. 1984). We thus are required to determine "whether any genuine issue of material fact exists, and, if not, whether the substantive law was correctly applied." Id.

Prima Facie Case of Discrimination

In granting summary judgment against Mr. Davis and thus affirming the MSPB, the district court concluded that because he offered no evidence that he had been

treated differently than a similarly situated white worker, Mr. Davis failed to prove even a prima facie case of race discrimination. Davis v. Rice, No. CIV-90-776-P, Order Granting Summary Judgment, slip op. at 8-9 (W.D. Okla. Sept. 24, 1990) (District Court Order). We have reviewed the record and agree that Mr. Davis failed to present sufficient evidence of discrimination.

Mr. Davis advanced a discrimination claim based on disparate treatment and so must show that he was treated in a manner, which, "but for [his race] would be different." City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978). In order to establish a prima facie case of race discrimination based on individual disparate treatment, Mr. Davis must prove that (1) he is a

member of a protected group; (2) he was similarly situated by circumstance to an individual not a member of such a group; and (3) he was treated more harshly or disparately than the similarly situated non-group member. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 & n.13 (1973); McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1260 (10th Cir. 1988). The plaintiff must produce evidence of discriminatory intent or motive to establish a prima facie case; this intent can be inferred from the mere fact of differences in treatment. McAlester, 851 F.2d at 1260. Mr. Davis, however, can point to no one who was not a member of a protected group and whose circumstances were similar to his who received more favorable treatment than he did. He therefore has not established a

prima facie case of race discrimination. Indeed, the evidence indicates that Mr. Fairbetter, a Caucasian similarly charged with sexual harassment was given the exact same penalty by the defendant as was Mr. Davis.[4]

Trial De Novo

Mr. Davis correctly argues that 5 U.S.C. § 7703(c) (1988) requires a trial de novo in cases of discrimination. Mr. Davis, however, has received a trial de novo on his discrimination claim. He now attempts to argue that the district court, by considering the MSPB record from the proceedings surrounding the sexual harassment claim, has somehow denied him his de novo review. This argument is not persuasive.

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[4] Mr. Davis does not argue that he was sanctioned for less abusive behavior than was his Caucasian counterpart.

Mr. Davis cites Whatley v. Skaggs Cos., Inc., 707 F.2d 1129, 1137 (10th Cir.), cert. denied, 464 U.S. 938 (1983), for the proposition that an agency record is inadmissable in a subsequent trial de novo involving a claim of racial discrimination. Whatley, however, is distinguishable from this case. In Whatley the court was reviewing an agency finding regarding the plaintiff's claim of race discrimination in a subsequent trial regarding the same claim. Here, the district court reviewed the defendant's record regarding the sexual harassment proceedings to determine whether the defendant had a legitimate nondiscriminatory reason for demoting Mr. Davis. The district court was not reviewing the record from the MSPB to determine whether the finding of sexual

harassment could stand but rather was considering whether the defendant had raised a genuine issue of fact regarding its treatment of Mr. Davis sufficient to rebut the charges of race discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). The district court, consistent with Burdine, reviewed the MSPB record to determine whether it could rationally conclude that the demotion of Mr. Davis had not been motivated by discriminatory animus. Id. at 257. Because of Mr. Davis' failure to prove a prima facie case of discrimination, the court was not required to examine defendant's evidence regarding his nondiscriminatory reason for demoting Mr. Davis. However, the court did not err in conducting this

review. [5]

Mr. Davis argues that because this case was disposed of on summary judgment he was denied his statutorily mandated trial de novo. Mr. Davis cites no case, however, holding that the rules of civil procedure regarding summary judgment are suspended in Title VII cases. On the contrary, while the courts may be more cautious in granting summary judgment in cases where intent and motivation are at issue, summary judgment may still be appropriate in some circumstances. Foster v. Arcata Assocs., Inc., 772 F.2d 1453, 1459 (9th Cir. 1985), cert. denied,

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[5] The court in Whatley was also concerned about the problem of hearsay. That problem does not exist in this case, however, because the record considered by the district court was not offered to prove the truth of the matters contained therein, but rather was offered to show absence of discriminatory animus on the part of the defendant.

475 U.S. 1048 (1986). "One purpose of the allocation of burden in Title VII and ADEA actions is to enable the district courts to identify meritless suits and dispense with them short of trial." Id.; accord Schwenke v. Skaggs Alpha Beta, Inc., 858 F.2d 627, 628 (10th Cir. 1988). Under the facts of this case, summary judgment was appropriate and did not deny Mr. Davis his day in court. [6]

Constitutional Claims

In his complaint, Mr. Davis alleged the deprivation of his constitutional right to equal protection and due process. Complaint at 4, 6. The

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[6] Mr. Davis' remaining arguments regarding procedural irregularity are without merit. We are satisfied that both the MSPB and the district court followed federal procedural law in this matter and that the action of the MSPB was neither arbitrary nor capricious. Wilder, 846 F.2d at 619.

district court was correct in noting that such constitutional claims are not within its subject matter jurisdiction. District Court Order at 13-14. In Bush v. Lucas, 462 U.S. 367, 385-86 (1983), the Supreme Court held that constitutional claims raised by federal employees are fully cognizable in the elaborate, comprehensive civil service system created by Congress. It thus refused to recognize a Bivens[7] remedy for constitutional violations alleged by federal employees. Id. at 390; see also Petrini v. Howard, 918 F.2d 1482, 1483-84 (10th Cir. 1990) (citing Lombardi v. Small Business Admin., 889 F.2d 959 (10th Cir. 1989); Brothers v. Custis, 886 F.2d 1282 (10th Cir. 1989); Hill v. Department

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[7] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

of the Air Force, 884 F.2d 1318 (10th Cir. 1989), cert. denied sub nom. Hill v. Britt, _____ U.S. _____, 110 S.Ct. 2206 (1990). Thus the merit system of which Mr. Davis is a part presented his exclusive avenue for relief. See Wilder, 846, F.2d at 626-27.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

ENTERED FOR THE COURT

STEPHEN H. ANDERSON
Circuit Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES DAVIS, Plaintiff, vs. DONALD B. RICE, Secretary of the Air Force, Defendant.	)))))No. CIV-90-776-P))ORDER GRANTING SUMMARY JUDGMENT)

I. INTRODUCTION

At issue is defendant Donald B. Rice, Secretary, Department of the Air Force's motion to dismiss filed July 16, 1990, or in the alternative for summary judgment. Plaintiff James Davis responded on August 10, 1990, to which Rice replied on September 7, 1990. This is a racial discrimination case brought by a federal civilian employee. 42 U.S.C. § 2000e; U.S. Const. fifth amend. Essentially plaintiff claims that he was

treated more harshly than a non-Black who was disciplined for recent sexual harassment claims while such claims against plaintiff were stale. Because matters have been presented to the Court outside the pleadings, which have not been excluded by the Court, the Court shall treat this motion as one for summary judgment. Fed. R. Civ. P. 12(b)(6) & 56.

II. STANDARD FOR SUMMARY JUDGMENT

The facts presented to the court upon a motion for summary judgment must be construed in a light most favorable to the nonmoving party. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); United States v. Diebold, Inc., 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate.

Only genuine disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Finally, the movant must show entitlement to judgment as a matter of law. Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Although the Court must view the facts and inferences to be drawn from the record in the light most favorable to the nonmoving party, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." Burnette v. Dow Chem. Co., 849 F.2d 1269, 1273 (10th Cir. 1988). As stated by the Supreme Court, "[s]ummary judgment

procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The Supreme Court articulated the standard to be used in summary judgment cases, emphasizing the "requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). A dispute is "genuine" "if a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The Court stated that the question is "whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." Id. at 252.

III. UNDISPUTED FACTS

Rule 14(B) of the Western District of Oklahoma provides a framework for determining undisputed facts at the summary judgment stage. The Rule provides:

> The brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall

> be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

W.D. Okla. R. 14(B).

A review of Rice's brief and Davis' response reveals that the following facts are undisputed within the meaning of Rule 14(B) for the purposes of this motion only:

1. On August 7, 1989, Davis was

notified of his supervisor's intent to remove him from federal employment. On August 20, 1989, Davis notified the agency that Lewis Barber, attorney at law, would be his representative in the proposed removal action. After consideration of the matters presented by Davis and his attorney as well as other relevant factors such as his lack of prior disciplinary actions, lengthy service, etc., the deciding official, Major Steven J. Nugent, Chief, Accounting and Finance, Office of the Comptroller, Tinker Air Force Base, Oklahoma, notified Davis of his decision to retain him in the federal service but demote him to the grade of GS-11 and assign him to non-supervisory duties. The reduction became effective on October 15, 1989.

2. Davis filed an appeal to the

Merit Systems Protection Board ("MSPB") which was dated November 2, 1989, and received by the Board on November 8, 1989. In the appeal Davis alleged that he had been "discriminated against on the basis of [his] race, Black-American." He further alleged that he was involved in a relationship with a Caucasian female and "[b]ecause of this relationship, the Agency desired to terminate [his] employment . . . [and that] [w]ere it not for the Agency's disapproval of interracial relationships, it would have dismissed the charges against [him]."

3. A hearing on the appeal was scheduled for the week of February 5, 1990, but, at Davis' request, the hearing was cancelled and the Administrative Judge decided the matter on the record before him. The Administrative Judge's

initial decision, issued March 8, 1990, found (1) that Davis had failed to establish a prima facie case of discrimination; (2) that the agency had proven Davis' sexual harassment of three female employees; (3) that there had been no harmful error to Davis in the processing of the proposed removal and ultimate demotion action; and (4) that the demotion action was "within the limits of reasonableness and promotes the efficiency of the service." The opinion also affirmed the Agency's action. There being no appeal for review by the entire Board, the Administrative Judge's Initial Decision became the MSPB Final Decision on April 12, 1990. Thereafter, on May 14, 1990, Davis filed the instant suit. Rice's brief at 2-3; Davis' response brief at 1-2.

IV. ANALYSIS

A. Racial Discrimination Claim.

Davis alleges in his Complaint that he was the victim of disparate racial discrimination because Davis received a notice of proposed removal based on allegations of his sexual harassment while a similarly-situated Caucasian employee did not. This is so, argues Davis, because the allegations against him were eight years stale while the allegations against the Caucasian employee were more recent. A.F.R. 40-750, at para. 20 ("management must initiate inquiry while information is fresh and readily available"). The Court has carefully reviewed the evidentiary submissions on this matter and finds

Davis' claim to be without merit.[1]

The Court finds the sexual harassment claim against Davis to be well-grounded in fact. The disciplinary action against him was initiated on August 7, 1989, when Davis was notified of his proposed removal from federal employment. At the outset the Court notes that Davis, a Black male supervisor, admits to making some verbal remarks to females. These admissions

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[1] Davis argues that he was notified that he was going to be removed for allegations of misconduct that occurred eight years earlier. This characterization is inaccurate. An eight-year old allegation was made that Davis took a married female co-worker, Doris Mills, to his apartment where he allegedly pulled down her panties and while pulling down his own pants she fled. This incident was allegedly verbally revealed to management, but no written complaint was ever filed. There were certainly more recent examples of alleged harassment as found below, which Davis fails to address in his brief.

make a good starting point for the Court's inquiry because unrefutably they show that certain allegations were not stale and raise suspicions that are confirmed by other evidence. Davis admits that in November 1988 he "complimented" a Caucasian female, Rhonda Brown, that she was "looking like a white girl." Rice's brief at Ex. D, pp. 12, 14. Davis stated that the phrase was used by many employees at Tinker Air Force Base. Id. at p. 12. This incident was witnessed by Brown's supervisor, Donna House, a Caucasian supervisor, whom Davis dated. Incidentally, it was this interracial relationship between Davis and House, that Davis suggests was a further motivation for the alleged racial discrimination against him by the Air Force. There is no evidence to support

this conclusionary allegation nor even a hint of any evidence that could be derived through further discovery. The allegation is rejected outright. Dart Indus. v. Plunkett Co. of Okla. Inc., 704 F.2d 496, 458 (10th Cir. 1983); Fed. R. Civ. P. 56(e). Davis did not even address this issue in the affidavit he submitted. Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943, 945-46 (10th Cir. 1989). However, even conclusionary affidavits are insufficient to overcome summary judgment. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1380 & n.7 (10th Cir. 1980).

Importantly, Davis also admitted that he did not speak to Brown subsequent to the admitted incident because she made it clear that the "compliment" was unwelcome. Rice's brief at Ex. D, p. 12.

The unwelcome advance was acknowledged by House. Id. at p. 14. In a second admitted incident Davis acknowledged telling Cheryl Dinwiddie that she was wearing a pretty dress. Id. at p. 12. This incident occurred on April 6 or 7, 1989. Id. at Ex. A, pp. 25, para. 8, 33-34.

These two admissions by Davis are informative. Sex discrimination in the form of sexual harassment is seldom admitted by perpetrators, and therefore motivation must often be deduced from circumstantial evidence. While these admissions by themselves do not incriminate Davis, they do raise serious suspicions. A Black male supervisory employee is clearly out of line when he uses a sexually-loaded phrase such as "you are looking like a white woman" to

an indirect, subordinate Caucasian female employee. Second, this incident was within nine (9) months of the initiation of the disciplinary procedure and was not stale. Significantly, Davis learned, or should have learned, from the first admitted incident that his compliments to female subordinates were unwelcome. Within five (5) months of this incident he again admits to complimenting another female subordinate, Cheryl Dinwiddie, in regard to wearing a pretty dress. Even this seemingly innocuous admission indicates questionable judgment in light of the prior incident. Moreover, Dinwiddie stated under oath that the remark regarding her dress was not so complimentary. She stated that Davis remarked about her legs, and after watching her come up a ramp told her that

she was going to have to quit wearing that dress and showing off her legs. Id. at p. 33. Brown also shed further light on Davis' "compliment" to her. She stated that he also stared at her and looked her over from top to bottom. Id. at p. 31. Brown stated that she felt so uncomfortable that she began to avoid Davis and changed her mode of dress. Id.; Ex. D, p. 9.

The Tenth Circuit Court of Appeals has expressed its strong concern for the "menace of sexual harassment in the workplace." Starrett v. Wadley, 876 F.2d 808, 815 n.9 (10th Cir. 1989). In another case the Tenth Circuit decided that an employer has the legal right to terminate a supervisory employee based on evidence in part that he pulled down his zipper and told a female employee "if you

want it here it is." Williams v. Maremont Corp., 875 F.2d 1476, 477-78 (10th Cir. 1989). In the instant case the examples listed above justify the Air Force's action of demoting Davis from his supervisory position. There is no evidence before this Court that the Air Force's action was based on Davis' race. There is also no evidence in the record that the Air Force disapproved of Davis' interracial relationship. In the administrative proceedings Davis' principal evidence was affidavits from female workers who stated that they were not aware of any sexual harassment by Davis. This character evidence simply does not overcome the incriminating evidence mustered against Davis. Davis' claims of discrimination are not well-grounded in fact. and appear to be a

makeweight excuse by Davis to cover his own misdeeds.

The Court also rejects Davis' disparate treatment claim based on a Caucasian, Don Fairbetter, receiving a demotion based on fresh claims while the allegations against Davis were stale. The incidents cited above justify the Air Force's action and were not stale. Both Davis and Fairbetter were given the same punishment. There is also absolutely no merit to Davis' claim that he was initially warned of removal while the Caucasian was not. The evidence proves otherwise. Rice's brief at Ex. E, p. 27, para. 1. The Court specifically finds that Davis has not even proved a prima facie case of racial discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Even if Davis had

shown a prima facie case then the non-discriminatory reason for his demotion is so overwhelming that summary judgment would still have been granted to defendant. Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1184 (10th Cir.) rehg denied en banc, 747 F.2d 710 (1984); see Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595-96 (11th Cir. 1987).

Furthermore, the Air Force had an abundance of other evidence not admitted by Davis, as well as background information, that supported the sexual harassment claim against Davis. Initially, in 1984 when Davis had first been promoted to a supervisory position, John Worley, retired Colonel, told Davis that he was being promoted over the objections of the General, which were

based on protests by 20-30 women employees concerning Davis' reputation for sexual harassment. Id. at E, pp. 7-8. Davis was on expressed notice of problems with this behavior since that time and had also received training as a supervisor on the problem of sexual harassment. Id. at Exs. B, p. 2, para. 9, & E, p. 5. There was other evidence of Davis' misbehavior. For example, Brown also swore under oath that Davis had commented on her rear over the past three years, had told her it was looking good, and compared it with those of other women. Id. at Ex. A, p. 31. There is also persuasive, sworn evidence in the record that Davis made many other sexually-suggestive remarks, offensively and aggressively touched female subordinates, which included intimate

areas, and lewdly referred to various women's intimate body parts. E.g., id., at Ex. D, pp. 2, 5-11. There was further evidence of uncomfortable physical and pschological distress suffered by several women, and background information that one subordinate, Doris Mills, downgraded her position to avoid further contact with Davis. Id. at pp. 2, 5, 7, 8, 10, 16. contrary to Davis' argument to the Administrative Law Judge on appeal this evidence was corroborated by eyewitnesses and was consistent with other evidence. Id. at p. 13. The Administrative Law Judge did find that the alleged pre-1984 unwelcome sexual conduct toward Mills, and the lack of specificity regarding subsequent alleged harassment of her could not be used to prove the charge against Davis. Id. at p. 15; see note 1

above.

Finally, in his Complaint Davis refers to several procedural problems with the proceedings below, which were only generally addressed in his brief. First, Davis claimed that he was threatened with a proposed removal, which he contended was improper for a first offense. This is really not an issue in controversy as Davis was not ultimately removed from federal service, but rather only demoted. Moreover, if sexual harassment by a supervisor is found to be deliberate, which is supported by the evidence here, then removal is within the range of disciplinary options. Rice's brief at Ex. F, para. 29b. Second, Davis' contention in his Complaint that Rice wilfully violated this procedure is obviously without merit since no

foundational violation by Rice can be found. Third, Davis' contention in his Complaint that Rice failed to perform a proper investigation and therefore the decision to demote Davis could not be supported by the evidence is simply unfounded. Davis did not even bother to address this issue in his brief. If any fault can be found with the Air Force it might be that it erred on the side of restraint in disciplining Davis. Davis cannot quarrel with that result.

B. Fifth Amendment Due Process Claim

Davis argues that he was deprived of fifth amendment due process because Rice failed to follow its own regulations, and the deciding official acted outside his scope of authority. U.S. Const. fifth amend. In this respect, Davis argues that his due process rights were violated

because Rice relied on stale, unsupported, and internally contradictory allegations of sexual harassment, and such reliance was contrary to the Air Force's internal rules, regulations, policies and procedures. The Court rejects this contention. The Court has already found that Davis' demotion was well justified by evidence that was relatively recent to the disciplinary event. For example, Cheryl Dinwiddie provided evidence of sexually-suggestive remarks which were made by Davis only four months before disciplinary procedures were initiated. Rice's brief at Ex. A, p. 33. This was one of several examples which showed Davis participated in recent, as well as chronic and continuing, sexual harassment acts. Davis did not explain in his brief how

the allegations of sexual harassment were internally contradictory as alleged in his Complaint. From a review of the record the Court finds that the allegations were consistent with each other, and sworn statements by direct witnesses were corroborated by statements from eyewitnesses. Id. at Exs. A, pp. 28-54, & D, p. 13.

In his brief Davis argued that the deciding official, Major Nugent, excluded Davis' supervisor from input into the decision to demote Davis, and somehow this violated Davis' fifth amendment rights. Davis did not offer any citations of authority that required input from his supervisor except a mere conclusionary remark in an affidavit that this was a violation of internal procedures. This gesture does not

overcome summary judgment.

The Court also does not find this argument persuasive even if input from a supervisor was required by regulation. Davis had an opportunity to make a written reply to the allegations and could have elicited input from his supervisor. See id. at Ex. E, p. 31. Further, Davis had an opportunity to present evidence and witnesses to the Merit Systems Protection Board. Id. The record reflects that Davis waived his right to a hearing with the effect that the appeal was decided on written submissions. Id. at Ex. C, pp. 1-2. It appears that Davis offered no affidavit from his supervisor which he now meekly argues would have changed the entire outcome of the decision. This right if it exists was waived.

In his Complaint Davis contended that the demotion was arbitrary and capricious because it did not conform to a fair standard of proof. The only argument that Davis conceivably makes in his brief in this regard concerns the stale claims, which the Court has not found convincing. Davis' due process claim is without merit.

Furthermore, Rice argues that in his Complaint Davis stated that he was deprived of his due process rights because of racial discrimination. If this is so then Davis' exclusive remedy, as a federal civil employee, would be under Title VII. Brown v. GSA, 425 U.S. 820, 824-29 (1976). Alternatively, if the due process claims do not arise out of discriminatory acts, but rather under procedural errors used to determine

Davis' demotion, which is more likely, then Davis' exclusive remedy is the Civil Service Reform Act. 5 U.S.C. Ch. 75; see Bush v. Lucas, 462 U.S. 367, 386 (1983) ("Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within the system.") Therefore, even if Davis' constitutional claims under the fifth amendment were meritorious, which they are not, they would have to be dismissed. Either way Davis cannot prevail.

C. Fifth Amendment Equal Protection Claim

Finally, Davis contends that he has been intentionally discriminated against based on his race, and that similarly-situated persons have been treated differently based on racial consideration. In his brief Davis hinged

this claim on the staleness issue and his supervisor's lack of input in the demotion decision. These arguments are without force. The Court notes that Davis did not allege that the input of a Caucasian's supervisor was elicited as an example of unequal treatment. Outside of Davis' conclusionary statements the Court has found absolutely no basis to conclude that there was racial discrimination or unequal treatment. The equal protection claim is without merit, and also suffers from the same subject matter jurisdiction problems as the due process claims. 28 U.S.C. § 1331; Bush v. Lucas, 462 U.S. at 386.

V. CONCLUSION

Accordingly, summary judgment is **GRANTED** to Rice, and he is hereby directed to file a final entry of

judgment consistent with this Order and the local rules. W.D. Okla. R. 23(A).

IT IS SO ORDERED THIS 24th DAY OF SEPTEMBER, 1990.

/s/
LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES DAVIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-90-776-P
	)	
	)	
DONALD B. RICE, Secretary of the Air Force,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

Comes before the Court the Motion for Summary Judgment filed by the defendant, Donald B. Rice, Secretary of the Air Force, on July 16, 1990. Being fully advised of the premises, and in accordance with this Court's Order Granting Summary Judgment dated September 24, 1990;

IT IS SO ORDERED, ADJUDGED AND DECREED that Judgment shall be entered on behalf of the defendant, Donald B. Rice,

Secretary of the Air Force.

IT IS SO ORDERED.

Dated this 17th day of October, 1990.

/s/
LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON
10-17-90

Approved as to Form Only:

Lewis Barber, Jr.
Attorney for Plaintiff

/s/
Steve K. Mullins
Assistant United States Attorney
Attorney for Defendant

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES DAVIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 90-6358
v.	)	
	)	
DONALD B. RICE, Secretary, Department of the Air Force,	)	
	)	
	)	
Defendant-Appellee.	)	

ORDER

Filed August 1, 1991

Before ANDERSON, TACHA, BRORBY, Circuit judges.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

/s/
ROBERT L. HOECKER, Clerk

APPENDIX "E"

TITLE 5 U.S.C. § 7703.

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph

(2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed

within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the

employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director off the Office of Personnel Management may obtain review off any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the

Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

APPENDIX "F"

29 C.F.R. § 1613.214
Filing and presentation of complaint.

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if-

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him\her to believe he\she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action....